Supreme Court, U. S.
FILED
JAN 23 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-1140

LEONARD J. BURDETTE,
Petitioner,

VS.

INDIANA & MICHIGAN ELECTRIC COMPANY,
a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

George A. Daugherty
No. 3 Capitol Street
Charleston, West Virginia
25301
Counsel For Petitioner
and
John Amick
Security Building
Charleston, West Virginia
25301
Counsel for Petitioner

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Leonard J. Burdette, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on October 26, 1979.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, Unpublished, is included in slip opinion form and attached hereto as Exhibit A in the Appendix. The Opinion of the District Court is attached hereto as Exhibit B in the Appendix.

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was entered on October 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §12 54(1).

QUESTION PRESENTED

Whether the District Court erred in refusing to submit to the jury a definition of "seaman" within the meaning of the Jones Act, 46 U.S.C. §688, as interpreted in Offshore Company, v Robison, 266 F. 2d 769 (5 Cir. 1959).

STATUTE INVOLVED

The statutory provision involved is the Jones Act, 46 U.S.C. §688.

STATEMENT

Petitioner, Leonard J. Burdette, was injured on June 4, 1974, while working as an employee of the Respondent. His primary duties consisted of work upon and tending to barges belonging to the Respondent and keeping them fit for the purposes for which they were intended, to wit, the hauling of coal upon the Kanawha River. At the precise moment of Mr. Burdette's very serious injuries, he was undertaking to use a crowbar to remove a part of the deck of a barge which was made of wood and which was out of repair.

Petitioner brought suit in the United States District Court For The Southern District of West Virginia at Charleston, contending, among other things, that he was not supplied with adequate and safe equipment with which to do the job and was not supplied with adequate help whereby he could safely do the work required. Federal

jurisdiction was invoked under the Jones Act, 46 U.S.C. §688. The barge was floating on the Kanawha River at the time of Petitioner's injuries, the barge belonged to the Respondent, and the sole purpose of Petitioner's efforts was to aid in keeping the barge in service for the purposes for which it was intended.

At trial, the Petitioner's first witness, a co-employee, testified: that he was working at the time of the injury with the Petitioner; that he was an eye witness to the accident which occurred when he and the Petitioner were working on a coal barge on the Kanawha River; that the barge was used for the purpose of transporting coal on the Kanawha River; that he and the Petitioner were taking up the wooden deck on the barge because it had deteriorated and coal tended to fall into the bottom thereof; that it was his duty and that of the Petitioner to remove the flooring and

replace it with new planks; that he and Petitioner had been doing this sort of work for approximately two months; that from time to time the four man labor crew of which he and Petitioner were members, painted boats; that they would supply the boats and barges with wires, ropes, electrical outlets, oil drums, and that sort of thing and that they would string the barges with electric cable which was used to pump the barges out while moored on the river; that they tore out and replaced decks on wooden barges, and cut and wired cable for the purpose of connecting the barges together; that they would paint the boats and scrub them; that they, using a sledge hammer, would apply the wheel or propeller to boats on the river; that they were called upon to be night watchmen, which required them to check the barges for water and if they needed pumping to check the pumps; that they would pump the water out of the gunnels; that they would set up

lights with a white lantern to show that a vessel was moored or tied up and if it was moving they would utilize a red or green light to designate such fact and that this was done on a whole fleet of barges; that they worked on boats which propel the barges if they were tied up beside the river so that they might be securely tied to the dock and lighted for safety; that he and Petitioner actually had the duty of pulling the barges through the water; that they had the duty of setting up and placing the barges on the dry docks and pulling the barges there by hand with ropes; that once they had moved the barges through the dry docks they would have the duty of hooking on the dry dock and tying the barge on one end and the dry dock on the other; that they had patched holes in the barges to slow leaks until they could get them to the dry dock to seal them properly; that they would clean oil filters and carry oil

filters off and burn them and also carry new filters onto the boat and sometimes would re-supply the derrick boat with coal and that they would shovel coal from the line deck into the derrick boat; that they would unload and move planks around with the derrick boat and sometimes have to move the boat into the water; that they were required to go down into the bilge of the boat and clean out all of the old grease and oil, and carry it off, and that the bilge of the boat was in the bottom underneath the engine, and that the boat would be on the water when they did this; and that they would go into the manhole down inside the gunnels where the bottom had rotted, and shovel out the excess coal and rust. Petitioner himself testified that he did the same type of work previously described by his co-employee. He added that they rode the barges from one end of the dock to the other when they would finish

with them, and that they would, in fact, park the barges at the appropriate place for mooring, and tie them off. Also at the trial, the Respondent called the dock superintendent who was the Petitioner's boss at the time of the injury. He confirmed that virtually all the duties described by the Petitioner and his co-employee had, in fact, been performed by them as part of their job requirements.

The Petitioner requested that the jury be charged in accordance with the leading case of Offshore Company v Robison, 266 F. 2d 769 (5 Cir. 1959), as follows:

> " The Court charges the jury that Leonard Junior Burdette is entitled to be considered a seaman within the context of the Jones Act, if you find from a preponderance of all the evidence that he was injured and that at the time of his injuries he was assigned to a vessel or vessels and that he performed a substantial part of his work on such vessels, and, if the capacity in which he was employed or the duties which he performed

contributed to the function of the vessel or vessels to the accomplishment of their mission, or to the operation or welfare of the vessels in terms of their maintenance during its movement or during anchorage for the future trips."

The District Court disregarded the Petitioner's request that the jury be charged in accordance with Robison, supra, and instead gave the following charge concerning the definition of a "seaman" :

" But that first question is whether on the date of the accident the plaintiff was a seaman as that term is used in defining those persons covered by the Jones Act, as the Court just referred to a moment ago.

" Now the term seaman refers to one who is a member of the crew of a vessel. And a member of the crew in terms refers to those employees of a vessel who are naturally and primarily on board in aid of navigation.

" There are three essential elements in the term seaman as used in the Jones Act. First, the vessel on which the plaintiff is employed must be in navigation. Second, there must be a more or less permanent connection with the

vessel, and third, the plaintiff, that would be the plaintiff in this case, must be aboard primarily in aid of navigation.

" With respect to the term vessel, this includes a barge such as the barge on which Mr. Burdette was injured. For the purpose of determining whether an injured worker was a seaman within the scope of the Jones Act a vessel may be in navigation even though it is moored while still in the water.

" In applying these standards you should look to all the facts and circumstances surrounding plaintiff's employment, keeping in mind the above standards, and then recall the facts relating to the work plaintiff performed to determine whether this work was that ordinarily performed by a seaman under the definition of said term, or whether he was employed as a longshoreman, or injured in some other accident. Now that's the first, as I say, the first issue for you to determine, is that issue.

" Now with respect to certain terms, I defined I think the term seaman and the term negligence, proximate cause, contributory negligence, burden of proof, preponderance of the evidence, already have been explained to you. The vessel, the term vessel, I think in order for a structure to be a vessel,

as used under the provisions of the Jones Act, the first requirement that it must meet is that of being in navigation. This means more than the fact that it may be moved from time to time.

" Further the fact that any structure may be floating on the water is not determinative of the status of the vessel. The prime factors to be considered are the purposes for which this structure was placed in the water and the business in which it was engaged. In other words, a vessel may include the term barge, which is ordinarily used in connection with navigation. It need not actually be moving up and down the river. It may be moored and still be in the water of course, moored at the time and work may be going on on it.

" Now in the event you should determine that the plaintiff in this case was a seaman under the provisions of the Jones Act, which is the first issue that you need to determine, or at least one of the issues, and in this case I would say it would be the first issue to determine because that would be determinative -- if you should resolve it of course in favor of the defendant that determines the entire case. But in the event you should determine that the plaintiff was a seaman under the definition the Court has given you, under the terms of the Jones Act, then you get to the question of negligence. was the defendant negligent under the

facts in this case. What the plaintiff did at the time of the alleged injury. Are there any acts or omissions on the part of the defendant that could be termed negligence as the Court will define that term for you at this time. And then a little later we will get to the question of contributory negligence."

Approximately one hour after the jury commenced its deliberations, it returned and asked the Court to re-read its instruction with respect to the definition of a "seaman". The Court then made the following statement to the jury:

" THE COURT: The term "seaman" refers to one who is a member of the crew of a vessel. And a member of the crew in terms refers to those employees of a vessel who are naturally and primarily on board in aid of navigation.

" There are three essential elements in the term seaman as used in the Jones Act. First, the vessel on which the plaintiff is employed must be in navigation. Second, there must be a more or less permanent connection with the vessel, and third, the plaintiff

must be aboard primarily in aid of navigation.

" With respect to the term vessel, this includes a barge such as the barge on which Mr. Burdette was injured. For the purpose of determining whether an injured worker was a seaman within the scope of the Jones Act a vessel may be in navigation even though it is moored while still in the water.

" In applying these standards you should look to all the facts and circumstances surrounding plaintiff's employment keeping in mind the above standards and then recall the facts relating to the work plaintiff performed to determine whether this work was that ordinarily performed by a seaman under the definition of said term or whether he was employed as a longshoreman, or injured in some other accident.

" All right, you may retire to consider further of your verdict."

The jury then retired and later returned with a verdict for the respondent.

The Petitioner appealed to the United States Court of Appeals For The Fourth Circuit, assigning as error the Court's instruction with

regard to the definition of a "seaman". The case was argued on October 1, 1979, and on October 26, 1979, the United States Court of Appeals filed its Unpublished, Per Curiam Opinion affirming the lower court, which is attached hereto as Exhibit A of the Appendix.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

There is vital need to settle the decided conflict among the Federal Circuit Courts of Appeal concerning the correct definition and breadth of application of the term "seaman" within the meaning of the Jones Act, 46 U.S.C. §688.

It is clear that the rule being applied by the Fourth Circuit operates as a severe restriction upon the number of employees which may properly be considered "seamen" in the Fifth Circuit, and other Circuits which have applied or approved Offshore Company v. Robison, 266 F.2d 769 (5 Cir. 1959), and will continue

to so operate, unfairly discriminating against "seamen" injured within the jurisdiction of the Fourth Circuit, until such conflict is resolved.

Circuit Judge Wisdom, in Robison, cited the leading cases of Gianfalla v. Texas Co., 350 U.S. 879 (1955), South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940), Summerlin v. Massman Construction Co., 199 F.2d 715 (4 Cir. 1952), Wilkes v. Mississippi River Sand & Gravel Co., 202 F.2d 383 (6 Cir. 1953), and Gahagan Construction Corp. v. Armao, 165 F.2d 301 (1 Cir. 1948). Judge Wisdom stated, 266 F.2d at page 776:

> " There are common denominators in Gianfala, Bassett, Summerlin, Wilkes, and Gahagan decisions. (1) The claimants are not ordinarily thought of as 'seamen' aboard primarily in aid of navigation', although they may serve the vessel in the sense that the work they perform fits in with the function the vessel serves. Gianfala was a member of a drilling crew on a submersible barge, Summerlin a fireman

> on a derrick, Wilkes a common laborer on a dredge, Gahagan a deckhand on a dredge. They had absolutely nothing to do with navigation, as such, nothing to do with the operations or welfare of a vessel in the sense that a vessel is a means of transport by water, and were not members of a ship's company in the sense that ship's cook or carpenter are necessary or appropriate members of a ship's complement. But in the light of the function or mission of the special structure to which they were attached, they served in a capacity that contributed to the accomplishment of its mission in the same way that a surgeon serves as a member of the crew of a floating hospital. The Bassett decision is the only one of the four cited in which there was judicial sanction of the requirement that the Jones Act seaman must be aboard 'primarily in aid of navigation', and in that case the question at issue was the sufficiency of the evidence to justify a holding under the Longshoremen's Act. (2) The 'vessels' were not conventional vessels but special-purpose structures that in one case was on the bottom of the sea. In other words, under the Jones Act a vessel may mean something more than a means of transport on water." (Footnote omitted)

The Petitioner's requested charge was submitted on the basis of Judge Wisdom's conclusion that :

> " (T)here is an evidentiary basis for a Jones Act case to go to the jury:(1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips." (Footnote omitted)

Robison has been applied in virtually every Circuit in the country where numerous Jones Act cases are tried. In Bennett v. Perini Corporation, 510 F. 2d 114 (1 Cir. 1975), the District Court, at the conclusion of the appellant's evidence, had granted a directed verdict

for the appellee on the ground, inter alia, that appellant was not a seaman. The First Circuit, applying Robison, reversed and remanded for a new trial. The Court of Appeals for the Ninth Circuit has also approved Robison . Bullis v. 20th Century Fox, 474 F. 2d 392 (9Cir. 1973). Although the language used by the Bullis court was somewhat restricted compared to Robison , this was later attributed by one Ninth Circuit District Court to the unique factual situation presented to the Court of Appeals, and that same District Court felt free to apply the full force and effect of Robison. Johnson v. American Pile Driving Co., Inc., 377 F. Supp. 11 (W.D. Wash. 1975). See also, Baker v. Pacific Far East Lines, Inc., 451 F. Supp. 84 (N.D. Calif. 1978). District Courts from the Third and Eighth Circuits have also applied or impliedly approved the Robison test. See, Mietla v. Warner

Company, 387 F. Supp. 937 (E.D. Pa. 1975); Mroz v. Dravo Corporation, 293 F. Supp. 499 (W.D. Pa. 1968); and Brinegar v. San Ore Construction Company, 302 F. Supp. 630 (E.D. Ark. 1969).

However, the District Judge's charge in the instant case, as approved by the Fourth Circuit, totally ignores the rule set forth in Robison. That charge followed the teachings of and was consistant with the definition of "seaman" embraced by the Fourth Circuit in Whittington v. Sewer Construction Co., Inc., 541 F. 2d 427 (4 Cir. 1976). The Fourth Circuit so held in its Unpublished, Per Curiam Opinion affirming the trial judge.

The District Judge, following the Fourth Circuit test in Whittington told the jury that the term "seaman refers to one who is a member of the crew of a vessel". He further told the jury that "member of the crew " refers to

"those employees of a vessel who are naturally and primarily on board in aid of navigation". The District Judge told the jury that there were three essential elements in the term "seaman": the vessel must be in navigation, there must be a more or less permanent connection with the vessel and, the employee must be aboard primarily in aid of navigation. These requirements are clearly much more restrictive than the requirements of Robison, which would permit a jury to find that an employee was a "seaman" if he performed a substantial part of his work on the vessel and his duties contributed to the welfare of the vessel in terms of its maintenance during anchorage. Clearly, if the District Court had given a Robison type instruction as requested by the Petitioner, counsel's opportunity to argue and the jury's ability to understand the facts of this case pertinent to determining whether or not Petitioner was a "seaman"

within the meaning of the Jones Act, 46 U.S.C. §688, would have been greatly expanded and enhanced.

CONCLUSION

The Petitioner respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals For The Fourth Circuit in the instant case and to resolve the conflict among the Federal Courts of Appeals on the issue herein, which conflict is presently causing unfair hardship and unjust discrimination against injured workmen within the jurisdiction of the Fourth Circuit Court of Appeals.

RESPECTFULLY,
Counsel for Petitioner
George A. Daugherty
No. 3 Capitol Street
Charleston, West Virginia
25301

George A Daugherty

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 78-1031

Leonard Junior Burdette,

Appellant,

versus

Indiana & Michigan Electric Company, a corporation,

Appellee.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Dennis R. Knapp, District Judge.

Argued October 1, 1979 Decided October 26, 1979

Before HAYNSWORTH, Chief Judge, BRYAN, Senior Circuit Judge, and MURNAGHAN, Circuit Judge

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George A. Daugherty (Daugherty & Tantlinger, Lawyers, L.C. and John A. Amick on brief) for Appellant; Thomas W. Pettit (Vinson, Meek, Peoples & Pettit; James M. Casey, Musgrave, Musgrave & Casey on brief) for Appellee.

Exhibit A

PER CURIAM:

Plaintiff was injured while working on a barge owned by his employer. He filed a Jones Act suit against the employer. Defendant's motions for directed verdict on the ground that plaintiff was not a "seaman" within the purview of the Jones Act were rejected, and the case was submitted to the jury, which returned a verdict for the defendant. Plaintiff appeals, urging that the trial court erred in instructing the jury as to the definition of "seaman."

We find no error. The trial judge's three-part instruction was consistent with the definition of "seaman" embraced by this court in Whittington v. Sewer Construction Co., Inc., 541 F.2d 427, 436 (4th Cir. 1976). Moreover, a finding that plaintiff was not a seaman for Jones Act purposes is eminently reasonable on the record in this case.

AFFIRMED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON

LEONARD JUNIOR BURDETTE,

Plaintiff,

Vs. Civil Action No. 76-0226-CH,

INDIANA & MICHIGAN ELECTRIC CORPORATION, a corporation,

Defendant.

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NO 63 PAGE 153

MEMORANDUM ORDER

As a result of an adverse jury verdict, plaintiff has moved the Court to set aside the verdict of the jury and the judgment entered thereon and to grant him a new trial. In support of the motion, plaintiff contends that the Court erred in not charging the jury in terms of plaintiff's requests Nos. I and II. Those requests are set forth in the motion and need not be repeated here.

Request No. I had to do with the definition of a Jones Act seaman. The Court feels that the jury were adequately charged with the law on this point. In fact, the Court took great pains in expanding on the definition from those requested by both plaintiff and defendant so as not to prejudice the plaintiff by charging the jury with what would amount to an incomplete proposition of law.

Plaintiff also complains, as to Request No. II, that the Court erred in not charging the jury to the effect that if the defendant were guilty of the slightest negligence, then the plaintiff could recover if such negligence proximately caused the plaintiff's injuries.

First, the Court believes that being "slightly negligent" is somewhat akin to being "slightly dead." That is,

Exhibit B

one either is or is not. Second, inasmuch as an action of this kind is really a comparative negligence type of case respecting the apportionment of fault, it is a jury question in and of itself as to what degree--slight or otherwise--a defendant (or plaintiff) might have been negligent.

The motion of the plaintiff for a new trial will therefore be denied, and it is so ORDERED.

The Clerk is directed to mail certified copies of this Memorandum Order to counsel of record herein.

ENTER: November 7, 1977

Dennis R. Knapp

DENNIS R. KNAPP
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the foregoing Petition For Writ of Certiorari upon the Respondent by posting in the United States mails, a true copy thereof, to their attorney, Raymond Musgrave, to his address P.O. Box 11, Point Pleasant, West Virginia 25550, in a properly stamped envelope, prepaid postage, first class, this 21st day of January, 1980.

George C. Daugherty

Supreme Court, U. S.
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LEONARD J. BURDETTE,

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INDIANA & MICHIGAN ELECTRIC COMPANY,

a corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Raymond Gerald Musgrave
MUSGRAVE, MUSGRAVE & CASEY
209 Fifth Street
Point Pleasant, West Virginia 25550
Counsel for Respondent

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OPINION BELOW

The Opinion delivered by the United States Court of Appeals for the Fourth Circuit, Unpublished, is copied and attached to the Petition as Exhibit "A" in the Appendix. The Opinion of the District Court is attached in the Petition as Exhibit "B" in the Appendix. Respondent adopts verbatim the copies of the Opinions deivered by these two Courts.

JURSIDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED

Did the District Court properly charge or instruct the jury regarding the criteria they were to use to determine Petitioner's eligibility as a seaman for purposes of recovery under the provisions of the Jones Act, 46 U.S.C. §688?

STATUTE INVOLVED

The statutory provision involved is the Jones Act, 46 U.S.C. §688.

STATEMENT

The statement of facts of Petitioner was prepared in apparent disregard of the applicable principles of review that the evidence is to be viewed and construed favorably to the prevailing party below, and all reasonable inferences of which the evidence is fairly susceptible should be drawn in support of, and not against, the judgement rendered below. Slatton v. Martin K. Eby Construction Co., Inc. 506 F. 2d 505 (8th Cir. 1974) cert. denied, 421 U.S. 931, 95 S. Ct. 1656, 44 L. Ed. 2d 88 (1975).

Respondent adopts a portion, only, of the Petitioner's Findings as a part of his Statement. This adoption includes the following pages of Petitioner's Statement on pages 1, 10, 11, 12 and the remaining part of page 14. Respondent does not adopt the version of Petitioner's requested charge, as drafted, in his interpretation of Offshore Company v. Robison, 266 F. 2d 769 (5th Cir. 1959), as set forth on part of pages 8 and 9 of his Statement.

Further, Respondent asserts Petitioner's version in his Statement on pages 4, 5, 6, 7 and continuing on page 8, does not fully set forth essential facts brought out at the trial which tend to greatly defeat Petitioner's alleged seaman status.

Respondent, Indiana & Michigan Electric Company, is primarily engaged in river transportation of coal on the Kanawha and Ohio

Rivers. On June 14, 1974, Petitioner was employed as a laborer at Respondent's river facilities at Cedar Grove, West Virginia, on the Kanawha River. Petitioner's Complaint states that as a result of Respondent's alleged negligence he was caused to suffer a disabling injury to his back, while he was performing the duties of prying up a deteriorated deck floor from a coal barge moored at the Respondent's landing.

The evidence offered during the course of the trial regarding Petitioner's employment status and duties at the date and time of his alleged injury, was offered by Petitioner, Curtis Starcher and John Nibert, Respondent's dock superintendent.

Petitioner's witness, Curtis Starcher, testified that he was a co-employee of Petitioner at the date and time of the alleged injury. Witness Starcher testified that the Petitioner had been in the employment of the Respondent for approximately two months prior to June 14, 1974. However, witness Starcher had not worked with Petitioner during that full period of time because Starcher had been previously employed by Respondent in the capacity of a seaman, classification of a watchman, aboard one of Respondent's motor vessels, before he took the job of laborer in the land bound work gang with the Petitioner and others.

Witness Starcher, testified to the clear and distinct differences in the duties that he and Respondent had as dock-side laborers on June 14, 1974, from that of the duties of a seaman or watchman aboard a motor vessel that he had just previously served and experienced. Starcher described his work and duties as a seaman and a member of a crew of a motor vessel. Starcher stated that he was required to work twenty-one days on the motor vessel and then would be allowed twenty-one days off the motor vessel. Starcher stated that he would eat and sleep on the motor vessel during this twenty-one day tour of duty because the vessel would be in navigation for the purposes of transporting coal in barges upon the Kanawha River. Witness Starcher stated that he wanted to quit the job of watchman, a seaman, because his permanent twenty-one day connection with the motor vessel upon which he was assigned was too long of a time period to stay away from home.

Curtis Starcher requested that the Respondents transfer him to a land based job so he could be home all the time. Respondent honored Starcher's transfer request and employed him in the capacity of a laborer. Starcher's testimony states now that he went home every night after he finished his eight hours of laboring duty, ate and slept at home. Witness Starcher further testified that duties of a laborer would be determined on a day to day base by John Nibert, Respondent's

dock superintendent. The testimony of this witness clearly establishes that no laborers were ever assigned to any of Respondent's motor vessels and that the duties of laborers, including Petitioner, on June 14, 1974, were among other things, painting and cleaning boats and barges, cutting cables, cutting grass, cleaning up roads and ditches, and getting groceries.

Petitioner's testimony corroborated that of Starcher in distinguishing between laborer and seaman. When asked if Petitioner was a member of any crew or vessel owned by the Respondent at the date and time of the alleged injury, his answer was "No, sir". Petitioner further stated that he did not take any of his meals aboard Respondent's motor vessels or stay there over night, and that he went home after finishing his duties as a laborer. Petitioner was definitely aware of his employment classification because his reiterated at the trial the answer to a question propounded previously at a deposition that his classification at the date and time of June 14, 1974, was that of a general laborer.

The evidence of John Nibert described the duties of the Petitioner in his laborer classification as that of shoveling coal, snow, mud, cleaning out ditches, cleaning, painting, helping with the docking of Respondent's vessels on the Respondent's real estate, together with, on occasions, putting new wooden decks in coal barges.

At the conclusion of the evidence before the district trial Court and jury, Petitioner submitted his requested charge, incorporating therein his interpretation of the Robison, supra, decision as it refers to the definition of a seaman within the context of the Jones Act, 46 U.S.C. §688. The District Court after considering Petitioner's request, used the accepted, undisputed and clear definition of seaman formulated by this Honorable Supreme Court of the United States in many previous decisions. Respondent will not reiterate the District Court's charge in regard to the definition of a seaman but will adopt in its entirety the quoted material contained in Petitioner's Statement commencing at the middle of page 9 and continuing through page 12 and then recontinuing to its finality on page 13 of Petitioner's Statement.

After twice deliberating, the jury returned with a verdict for the Respondent and Petitioner appealed to the United States Court of Appeals for the Fourth Circuit, assigning as error the Court's instruction with regard to the definition of a "seaman". Argument was scheduled and completed on October 1, 1979, and a decision was rendered on October 26, 1979, in the form of an Unpublished, PerCuriam Opinion affirming the lower District Court. Respondent would adopt verbatim Exhibit "A", pages one and two in the Petition for Writ of Certiorari setting forth this opinion #78-1031, in its Statement.

ARGUMENT

There is no ambiguity in the Federal Circuit Courts of Appeal concerning the correct definition for the application of the term seaman within the meaning of the Jones Act, 46 U.S.C. §688. The criteria to be used in the determination of eligibility of an employee as a Jones Act seaman has been consistently applied throughout the Federal Circuit Courts of Appeal, Senko v. LaCrosse Dredging Corp., 352 U.S. 370, (1957); Gianfalla v. Texas Co., 350 U.S. 879 (1955); Teller v. Atlantic Coast Line Railroad Company, 319 U.S. 54, (1943); South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940); Whittington v. Sewer Construction Company, Inc., 541 F. 2d 427 (4th Cir. 1976), Griffith v. Wheeling-Pittsburgh Steel Corporation and American Commercial Lines, Inc., 521 F. 2d 31 (3rd Cir. 1975); Lewis v. Rolan E. Trego & Sons, 501 F. 2d 372 (4th Cir. 1974); Baker v. Pacific Far East Line, Inc., 451 F. Supp. 84 (9th Cir. 1978), Buna v. Pacific Far East Lines, Inc., 441 F. Supp 1360 (9th Cir. 1977), Shows v. Harbour, 575 F. 2d 1253 (8th Cir. 1978), Burns v. Anchor Wate Co., 469 F. 2d 730 (5th Cir. 1972), Offshore Company v. Robison, 226 F. 2d 769 (5th Cir. 1959).

The Petitioner would have this court believe that the rule being applied by the Fourth Circuit for the determination of eligibility of an employee as a Jones Act seaman is drastically different than that ap-

plied in the other Federal Circuit Courts of Appeal. This is not so.

The Petitioner further asserts that the correct definition of a seaman to be used under the Jones Act is to be found in the case of Offshore Company v. Robison, 226 F. 2d 769 (5th Cir. 1959). This assertion by the Petitioner is without merit in that Robison, supra, did not define the term "seaman" and, in fact, the Court in Robison, supra, confined itself to a determination of when the issue of seamanship should go to the jury or when it should be decided by the trial Court. In the case at hand, the determination of seamanship was presented to the jury and the jury was properly charged as to essential elements to be used in making the determination of employee status under the Jones Act.

The Respondent does not deny that Robison, supra, has been apllied in virtually every Circuit in the country but once again the Respondent must point out that Robison, supra, stands for the proposition that in any instance where there is a question as to whether an employee would qualify for coverage under the Jones Act that question is to be determined by a jury. Whittington, supra, as noted by the Fourth Circuit's affirmation of the District Court's decision in this case, outlined the elements of the three pronged test to be used by the jury in making this determination.

Two Ninth Circuit cases indicate that the three pronged test as used in Whittington, supra, is the correct test for the determination of seaman status under the Jones Act. In Baker v. Pacific Far East Lines, Inc., 451 F. Supp. 84 (9th Cir. 1978) the plaintiff spent more than ninety per cent of his overall time working on barges or ships; however, after applying the three pronged test, the plaintiff was found by the jury not to meet the criteria essential for coverage as a seaman under the Jones Act and recovery was denied. The second Ninth Circuit case, Buna v. Pacific Far East Lines, Inc., 441 F. Supp. 1360 (9th Cir. 1977) specifically endorsed the Whittington, supra, criteria and cited Burns v. Anchor Wate Co., 469 F. 2d 730 (5th Cir. 1972), and Robison, supra, as being consistent with the holding in that decision.

The Petitioner asserts that charge one as proposed by the Petitioner to the District Court is a correct statement of law as applied in Robison, supra. A close examination of that charge as presented to the Court would reveal omissions in the language that are essential elements to establish Jones Act coverage as per Robison, supra. Specifically, the charge offered by the Petitioner failed to make note of any requirement that the injured workman be assigned permanently to a vessel or perform a substantial part of his work on a vessel. These requirements were included in the original decision of Robison, supra,

and were attached to the Petitioner's brief to the Fourth Circuit of Appeals as an Appendix.

The record fails to substantiate any permanent assignment of the Petitioner to any vessel in the Indiana & Michigan fleet or that he had ever performed duties of a crew member on any vessel within the Indiana & Michigan fleet. As the Fourth Circuit Court of Appeals correctly noted on page two of Petitioner's Exhibit "A"

> "Moreover, a finding that plaintiff was not a seaman for Jones Act purposes is iminently on the record in this case."

Respondent submits that the question of Petitioner's qualifications as a Jones Act seaman was properly presented to the jury, together with the necessary criteria for the determination of said eligibility as a Jones Act seaman and the jury, upon the evidence presented at the trial, found for the Respondent. Further, in a similar case decided in the Eighth Circuit involving a jury's determination of employee eligibility as a seaman under the Jones Act the Court stated:

> "As an appellate Court, we must view the evidence in the light most favorable to sustaining the jury's verdict, and we accept as established all reasonable inferences which tend to support the jury's determination. Slatton v. Martin K. Eby Construction Co., Inc. 506 F. 2d 505, 510 (8th Cir. 1974) cert. denied, 421 U.S. 931, 95 S. Ct. 1657, 44 L. Ed. 88 (1975)"

Therefore, Respondent asserts that the jury was properly charged as to the criteria to be used for the determination of Petitioner's eligibility as a Jones Act seaman under 46 U.S.C. §688 and the jury, after considering all of the evidence, found for the Respondent and against the Petitioner.

Additionally, Respondent asserts there is no compelling reason nor any showing by the Petitioner of substantial disagreement among the Circuit Courts of Appeal regarding the applicable criteria to be used in the determination of employee eligibility as a Jones Act seaman to warrant a grant of Certiorari in this particular case.

CONCLUSION

For the foregoing reasons, Indiana & Michigan Electric Company submits that the Judgement Order entered September 12, 1977, in the United States District Court for the Southern District at Huntington and the Order entered the 26th day of October, 1979, in the Fourth Circuit Court of Appeals be affirmed.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the foregoing Respondent's Brief in Opposition to Granting Petitioner's Petition for Writ of Certiorari by posting in the United States mails, a true copy thereof, to his attorneys, George A. Daugherty to his address, No. 3 Capitol Street, Charleston, West Virginia, 15301 and John Amick to his address, Security Building, Charleston, West Virginia, 25301, in properly stamped envelopes, prepaid postage, first class, this 23rd day of February, 1980.

Raymond Gerald Musgrave
MUSGRAVE, MUSGRAVE & CASEY
209 Fifth Street
Point Pleasant, West Virginia
25550